# Networked enforcement in the common fisheries policy through data sharing

# *Networked Enforcement in the Common Fisheries Policy through Data Sharing: Is There Room Left for Traditional Accountability Paradigms?*

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*The Common Fisheries Policy (CFP) is one of the ever-increasing policy areas that have witnessed the creation of forms of "networked enforcement", meaning enforcement structures in which several national and EU authorities cooperate. Amongst those are a number of legal requirements and applications for sharing data on fisheries between national and European competent authorities. This form of networked enforcement casts some questions as regards the existence of corresponding accountability mechanisms, which serve to legitimate the enforcement activities in the CFP. The aim of this paper is to examine the networked enforcement mechanisms arising from the CFP, with a special focus on the data-sharing activities and the role of European Fisheries Control Agency as pivotal to the cooperation between national authorities, with a view to assessing the gaps of accountability arising from them, and analysing the possible alternative ways to provide the enforcement phase with legitimacy.*

## I. Introduction

Regulatory studies, in their attempt to trace back the factors that are key for effective regulation, are increasingly casting light on all phases of the regulatory process, from its inception to norm adoption, evaluation and enforcement. Thus, the importance of later phases of the decision-making process, such as implementation and enforcement, for regulatory success has become common knowledge among regulatory scholars, after a long period in which most studies were focused on how policies are designed, rather than how they are carried out and enforced.[1]

In light of these considerations, there has been growing attention to the study of regulatory enforcement, first in the USA and, more recently, with regard to the EU. As for the latter, EU law-making and its effectiveness have been under investigation

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[1] OECD, *Regulatory Enforcement and Inspections, OECD Best Practice Principles for Regulatory Policy* (Paris, OECD Publishing 2014); JT Scholz, "Voluntary compliance and regulatory enforcement" (1984) 4 Law & Policy 385.

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by scholars and practitioners for the last two decades, since EU law's manifold implementation gaps started to be detected.[2]

This well-known implementation deficit, together with other reasons, pushed for an evolution and an enlargement of the powers of the EU, which turned from being a mainly regulatory organisation to one endowed (also) with enforcement powers.[3] The gradual but steady increase of direct enforcement[4] competences by the EU has recently started to be a topic for in-depth analysis. These direct enforcement powers might be exclusive to the EU or shared with the traditional authorities in charge with them (the Member States). As for the former case, several agencies[5] are being attributed such surveillance and direct enforcement powers.[6] As for the second case, it is possible to identify shared enforcement competences among a growing number of regulatory sectors in the EU.

Nonetheless, *shared* enforcement between Member States and the EU is only one of the possible evolutions of regulatory enforcement within the EU, pursuing more effectiveness beyond the traditional distribution of tasks. Beyond formalised new relationships between Member States and the EU, such as the abovementioned shared enforcement, we witness a growing trend of *collaborative* forms of enforcement between Member States and the EU authorities. These forms of enforcement are not always structured and operating pursuant (only) to legal norms, nor do they always involve an active role for traditional EU institutions or for the *ad hoc* agencies.

These innovative forms of enforcement can be encompassed in the broad definition of "networked enforcement", which is considered, to date, the "state of the art in [enforcement] literature".[7] Networked enforcement, in other words, aims at overcoming the criticisms brought so far to the previous enforcement models, since it attempts to allocate each specific task to the most suited actor, according to the "responsive regulation" strategy.[8] It is thereby acknowledged by the mainstream literature as a way to overcome the so called "governance dilemma",[9] based on the

[2] M García Quesada, "The EU as an 'enforcement patchwork': the impact of national enforcement for compliance with EU water law in Spain and Britain" (2014) 2 Journal of Public Policy 331; J Tallberg, "Paths to Compliance: Enforcement, Management and the European Union" (2002) 56 International Organization 609; J Vervaele, *Compliance and Enforcement of European Community Law* (The Hague, Kluwer 1999).

[3] See, for all, M Scholten et al, "The proliferation of EU enforcement authorities: a new development in law enforcement in the EU" in M Scholten and M Luchtman (eds), *Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability* (Cheltenham, Edward Elgar 2017) p 1.

[4] By direct enforcement, we mean the cases in which the Commission or an *ad hoc* agency are endowed with direct inspection or sanction powers against citizens and/or enterprises, that they can exert without involvement of a national competent authority. See M Scholten, "Mind the Trend! Enforcement of EU law has been moving to 'Brussels'" (2017) 24 Journal of European Public Policy 1348.

[5] Over the last decades many EU agencies have been set up with enforcement powers: see A Wonka and B Rittberger, "Credibility, Complexity and Uncertainty: Explaining the Institutional Independence of 29 EU Agencies" (2010) 33 West European Politics 730.

[6] See, eg, the ESMA with regard to some specific types of insurance enterprises, which are now under its direct inspecting and sanctioning powers.

[7] J Van der Heijden, "The long, but promising, road from deterrence to networked enforcement" in S Drake and M Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Cheltenham, Edward Elgar 2016) p 77.

[8] I Ayres and J Braithwaite, *Responsive Regulation. Transcending the Deregulation Debate* (Oxford, Oxford University Press 1992).

[9] B Eberlein and AL Newman, "Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union" (2008) 21 Governance 25.

notion that greater compliance would imply an active role of the EU institutions in enforcement, whereas Member States are never fine with giving up such powers.

However, the often informal nature of networks, and the existence of a "double delegation"[10] by the Commission, on the one hand, and national authorities, on the other, raises some doubts about their legitimacy and their level of accountability. Most contemporary reflections about democratic governance focus on the relevance of accountability as a normative principle, also in a changing political order such as the European one.[11] Therefore, given that "[a]ccountability processes are supposed to detect, assess and sanction deviances from authorized mandates",[12] the new trends observed in enforcement should be tested under such perspectives, and assessed as to the extent to which such deviances from the traditional model affect (or not) their capacity to account for what they do. Indeed, there can be many reasons why a certain EU policy is suited, in the Member States' view, to being enforced through a transnational network,[13] as the latter may reduce information and transaction costs and help create mutual trust. Nonetheless, resorting to networked – regulatory or enforcement – governance might lead to conflicts and make public governance less transparent and accountable[14] or raise further concerns about the EU democratic deficit.[15]

Against this backdrop, this paper aims at examining the gaps of political and judicial accountability arising in the system of networked enforcement in the case study of the Common Fisheries Policy (CFP). It does so by focusing on one specific activity of networked enforcement that, due to the very nature of informal cooperation among the actors involved, could raise some concerns as regards accountability, which is data sharing. For these purposes, joint inspections, though their role is crucial to enforce the CFP, will not be considered in detail.

The remainder of the paper is structured as follows. In Section II, we shed some light on the concept of networked enforcement. In Section III, we identify and analyse the networked enforcement mechanisms in the CFP and we explain our choice to focus on the systems of data sharing in the enforcement of the CFP. Sections IV and V, respectively, offer an examination of how the system of political and judicial accountability over CFP networked enforcement activities is organised. Finally, in Section VI we draw some conclusions about the mechanisms of networked enforcement within the CFP and about their impact on the overall political and judicial accountability system, with some hints for further research.

[10] D Coen and M Thatcher, "Network governance and multi-level delegation: European networks of regulatory agencies" (2008) 28 Journal of Public Policy 49.

[11] JP Olsen, "Democratic Accountability and the Changing European Political Order", *ARENA Working Paper* 8/2017 (2017).

[12] ibid, p 1.

[13] J Polak and E Versluis, "The virtues of interdependence and informality: an analysis of the role of transnational networks in the implementation of EU directives" in Drake and Smith, supra, note 7, p 105; Van der Heijden, supra, note 7.

[14] E Sørensen and J Torfing, "Making governance networks effective and democratic through metagovernance" (2009) 87 Public Administration 234.

[15] T Börzel and K Heard-Lauréote, "Networks in EU Multi-level Governance: Concepts and Contributions" (2009) 29 Journal of Public Policy 135.

## II. The concept of networked enforcement and its merits

The strengths of networked enforcement are said to "lie in flexibility and non-centrality: a variety of enforcement actors, a variety of enforcement strategies and a variety of enforcement styles are brought together".[16] Administrative networks are therefore established to fill the gaps between the EU's policy targets and its limited administrative capacity.[17] What makes a specific type of governance a "network" is usually its informal nature, although trans-disciplinary literature offers plenty of definitions for networked governance.[18] Whatever task the network is called to conduct (decisional, regulatory, enforcing and so on), the choice to do it through a network is therefore due to a functional approach, namely one aimed at helping all network participants to benefit from sharing their functions with other actors. Accordingly, the normative basis of networks is often not just the law, but above all the (shared) culture.[19] While in most remaining scholarly fields networked governance is firstly equated with the specific feature of being composed both by private and public actors,[20] in European studies European Regulatory Networks (ERNs) are largely known as being networks of members from the EU and the domestic level, and the private section is not necessary.[21] This is even more so with regard to enforcement networks, which, given the very nature of the task they are set up for, are necessarily limited to public actors, in charge of a supervisory role and endowed with inspection and sanctioning powers. In other words, as the regulatory process moves from a decision-making phase, where an enlarged active community is healthy to the decision itself, to a later phase, closing access to private parties is unavoidable.

Yet, *networked* enforcement differs from *shared* enforcement, which is also a peculiar configuration of functions between EU actors and Member States,[22] not only insofar as the former relies (at least also) on cultural rather than on legal bases, but above all because in ERNs we may find those typical "non-hierarchical forms of co-ordination" by which a network is identified, "such as the exchange of best practices, and the formulation of common (yet formally non-binding) standards to guide implementation".[23] As a result of networks' non-hierarchical nature, enforcement mechanisms carried out therein are

[16] Van der Heijden, supra, note 7, p 102.

[17] E Mastenbroek and DS Martinsen, "Filling the gap in the European administrative space: the role of administrative networks in EU implementation and enforcement" (2018) 25(3) Journal of European Public Policy 422. See also EG Heidbreder, "Multilevel policy enforcement: innovations in how to administer liberalized global markets" (2015) 93(4) Public Administration 940.

[18] J Kim, "Networks, Network Governance, and Networked Networks" (2006) 11 International Review of Public Administration 22.

[19] ibid. See also WW Powell, "Neither Markets nor Hierarchy" in B Staw and LL Cummings (eds), *Research in Organizational Behavior* (Greenwich, JAI Press 1990) p 295.

[20] E-H Klijn, "Governance and Governance Networks in Europe" (2008) 10 Public Management Review 505.

[21] M Blauberger and B Rittberger, "Conceptualizing and theorizing EU regulatory networks" (2015) 9 Regulation & Governance 367; D Levi-Faur, "Regulatory networks and regulatory agencification: towards a Single European Regulatory Space" (2011) 18 Journal of European Public Policy 810; K Van Boetzelaer and S Princen, "The Quest for Co-ordination in European Regulatory Networks" (2012) 50(5) Journal of Common Market Studies 819.

[22] M Scholten and M Luchtman (eds), *Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability* (Cheltenham, Edward Elgar 2017).

[23] Van Boetzelaer and Princen, supra, note 21, p 820.

non-sequential, insofar as they are not formalised within a strict process whereby a report, for example, is strictly issued prior to a sanction, or data collection necessarily responds to a specific mandate.

Given these preliminary distinctions, we intentionally do not consider the "shared enforcement" mechanisms between EU authorities and one or more national competent authorities, that have already been analysed in previous works.[24] We rather focus on the mechanisms where enforcement is shared in a co-operative, non-sequential, fashion between Member States and (though not necessarily) EU institutions.

Nevertheless, while we can rely on many studies regarding the role of regulatory networks, there is much less knowledge on their features and contribution in the enforcement phase.[25] This lack of attention towards the phenomenon of collaborative and networked enforcement is problematic for several reasons. First of all, it poses a serious question insofar as the so-called mixed administration of enforcement[26] is increasing in the EU, and it raises a key question over how the governed manage to control the governors. Moreover, since the enforcement tasks serve public purposes, but decisions taken target individuals and companies, it is crucial to understand and assess how transparent both political and judicial accountability mechanisms are for the authorities involved in the shared enforcement activities.

In light of the above considerations, we try to analyse how networked enforcement works and whether there are any accountability gaps in one specific policy field, the fisheries sector. We chose this focus because this sector has been one of the less studied so far with regard to administrative networks.[27] Furthermore, it is of utmost relevance within the overall EU regulatory scope, for the reasons that will be stressed below, and it has already proven to be a highly interesting field for investigation as regards shared enforcement,[28] since it experienced direct enforcement powers by both the Commission and an *ad hoc* agency. Its potential as a testing ground for institutional innovations in the enforcement phase is confirmed by the fact that a relevant number of enforcement networks can be identified within it, as will be discussed further below. Furthermore, with a view to contributing to a better understanding of the impact of such new forms of enforcement from a bottom up approach, able to provide feedback also with regard to the Member States (a largely underrated viewpoint in scholarly research on EU governance), we also focus on the National Competent Authorities (NCAs) from Italy and France and the accountability mechanisms working therein when it comes to the networked enforcement of the CFP. The two selected cases allow for a comparison of two different legal systems and political accountability arrangements. At the same time, they show quite similar implementation attitudes[29] and are involved in the same "Mediterranean" Joint

[24] F Cacciatore and M Eliantonio, "Fishing in troubled waters? Shared enforcement of the Common Fisheries Policy and accountability gaps" in Scholten and Luchtman, supra, note 22, p 168.

[25] Mastenbroek and Martinsen, supra, note 17.

[26] JH Jans et al (eds), *Europeanisation of Public Law* (Groningen, 2nd edn, Europa Law Publishing 2015).

[27] Mastenbroek and Martinsen, supra, note 17.

[28] Cacciatore and Eliantonio, supra, note 24.

[29] European Parliament, *Monitoring the application of European Union law. 2016 Annual Report* (Brussels, European Commission 2017) p 29.

Deployment Plan (JDP), as will be clarified below, which makes it possible to empirically investigate their role in some specific networked enforcement mechanisms.

## III. Networked enforcement of the CFP: a testing ground for new institutional forms?

### 1. Evolution of the CFP

Marine fisheries is one of the most relevant issues in EU policy making. In fact, 23 out of its 28 Member States have a coastline and almost half of the EU population lives in maritime regions.[30] Furthermore, 3% to 5% of the EU's GDP comes from the maritime sector and about 90% of the foreign trade takes place via maritime routes, and the world's largest merchant fleet is the European one.[31] Fisheries and coastal policies were therefore needed from the beginning, with a view to curbing unsustainable fish stocks exploitation and environmental damage, besides guaranteeing European fishermen a fair and competitive environment.

A CFP was established for the first time in 1983, and further changes and revisions provided for a growing rate of tasks and competences from Member States to the EU. Among the first questions covered by the CFP were rules about areas restricted to fishery, standard fishing gear used, minimum fish sizes and so forth. Also, since 1983 a fish management scheme has been adopted yearly, including the Total Allowable Catches (TACs) agreed by the Fisheries Council.

Yet, what had soon become clear was that the CFP was scarcely effective,[32] and the Member States were unable to sharply implement and enforce it.[33] This led in 2001 to a first major revision of the CFP, with the adoption by the Commission of a *Green Paper on the future of the Common Fisheries Policy* (COM(2001) 135 final), which proposed a decentralised enforcement system, where power was to be delegated to the lowest competent level of governance.[34] Council Regulation No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the CFP set up stronger and clearer enforcement powers on the part of the Member States.

A key part in such reform was played by the establishment of the Community Fisheries Control Agency (CFCA) in 2005 – later renamed the European Fisheries Control Agency (EFCA), a dedicated EU body with the mission to "coordinate control and inspection by Member States relating to the control and inspection

[30] For more information see <ec.europa.eu/maritimeaffairs/documentation/facts_and_figures/index_en.htm>, accessed 11 May 2019.

[31] European Union, *Maritime affairs and fisheries* (Luxembourg, Publications Office of the European Union 2014).

[32] C Johnson, "Fisheries Enforcement in European Community Waters Since 2002-Developments in Non-Flag Enforcement" (2008) 2 The International Journal of Marine and Coastal Law 249; D Symes, "Reform of the European Union's Common Fisheries Policy: Making Fisheries Management Work" (2009) 2 Fisheries Research 99.

[33] T Gray and J Hatchard, "The 2002 reform of the Common Fisheries Policy's system of governance – rhetoric or reality?" (2003) 27 Marine Policy 545; J-M DaRocha et al, "The Common Fisheries Policy: An enforcement problem" (2012) 36 Marine Policy 1309. The CFP has long been accused of "being unable to provide sustainable fisheries": TJ Hegland and J Raakjær, "Recovery Plans and the Balancing of Fishing Capacity and Fishing Possibilities: Path Dependence in the Common Fisheries Policy" in SS Gezelius and J Raakjær (eds), *Making Fisheries Management Work. Implementation of Policies for Sustainable Fishing* (New York, Springer 2008) p 131.

[34] SQ Eliasen et al, "Decentralising: The implementation of regionalization and co-management under the post-2013 Common Fisheries Policy" (2015) 62 Marine Policy 224.

obligations of the Community".[35] The Agency adopted its first work programme in 2007,[36] and a big step forward was represented in 2009 by the adoption of Council Regulation No 1224/2009,[37] establishing a Community control system for ensuring compliance with the rules of the CFP. According to the new framework, EFCA is granted both direct enforcement powers and an enhanced role in fostering cooperation between Member States with regard to those enforcement activities upon which they remain competent.

## 2. Networked enforcement of the CFP

The CFP, as noted, is one of the policy sectors in which the enforcement phase has experienced significant changes and innovations over time.[38] As previously remarked, the verticalising trend of enforcement[39] in this field has led not only to shared mechanisms between EFCA and the national authorities,[40] but also to a networked distribution of competences, involving also informal horizontal and vertical links between Member States and the EU authorities to boost enforcement. More specifically, three main mechanisms of networked enforcement of the CFP may be envisaged.

Networked enforcement mechanisms in the CFP are, first of all, envisaged by the so-called Joint Deployment Plans (JDPs), which are the main policy tools for EFCA to set out operational arrangements for efficient and coordinated control and inspection activities deriving from a Specific Control and Inspection Programme (SCIP). The adoption of JDPs is envisaged by Article 5 of Council Regulation (EC) No 768/2005. Through the JDPs, EFCA may provide for common criteria, priorities, benchmarks and procedures. JDPs are basically built on a network vocation, insofar as their adoption (following a previous SCIP adopted by the Commission) obliges the Member States to commit to provide concrete resources for the correct implementation and enforcement of the CFP principles and methodologies. In this context, EFCA plays a coordinating role, and to this end it is necessary for the Member States to notify it of every mean of control and inspection they intend to deploy.[41] EFCA is specifically responsible for: (a) coordinating control and inspection by Member States; (b) coordinating the deployment of the national means of control and inspection pooled by the Member States concerned; (c) assisting Member States

[35] Council Regulation (EC) 768/2005 establishing a Community Fisheries Control Agency and amending Regulation (EEC) 2847/93 establishing a control system applicable to the common fisheries policy [2005] OJ L128/1.

[36] CFCA, *Community Fisheries Control Agency Work Programme for 2007* (Vigo, Community Fisheries Control Agency 2007).

[37] Council Regulation (EC) 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy [2009] OJ L343/1.

[38] On the CFP's high percentage of non-compliance, see F González Laxe, "Dysfunctions in common fishing regulations" (2010) 34 Marine Policy 182. See also M Hadjimichael et al, "Distribution of the burden of fisheries regulations in Europe: The north/south divide" (2010) 34 Marine Policy 795.

[39] Scholten et al, supra, note 3. See also the specific findings from the research team on the verticalisation of enforcement established within the Renforce group: <renforce.rebo.uu.nl/bouwsteenprojecten/verticalisering-en-toezichthouders/>.

[40] Cacciatore and Eliantonio, supra, note 24.

[41] EFCA, *Core curriculum for the training of fisheries inspectors & union inspectors - 3 General principles and specific types of fisheries inspection* (Luxembourg, Publications Office of the European Union 2015).

in reporting information on fishing and control and inspection activities to itself, the Commission and concerned third parties. It is clear that JDPs, and the EFCA thereby, are key for Member States, which are able to pool their control and monitoring means, both human resources and means, whenever their policy objectives involve more than one Member State.

Within the JDPs we can identify different networked enforcement mechanisms, the main two being: (a) the system of joint inspections; and (b) the applications for sharing and viewing data, offered by EFCA.

The possibility of carrying out joint inspections is foreseen in the context of JDPs, and are therein regulated, whenever they are deemed appropriate for a more efficient enforcement of the fisheries policy. Specifically, joint inspections between the Member States concerned should be carried out according to JDPs' provisions so as to enhance uniformity of control, inspection and surveillance practices and to coordinate those activities. This is the case, for example, with the Mediterranean JDP (in which Italy and France participate), established in 2014 to implement the SCIP for fisheries exploiting stocks of bluefin tuna in the eastern Atlantic and the Mediterranean, swordfish in the Mediterranean and stocks of sardine and anchovy in the northern Adriatic Sea.[42]

Another set of networked enforcement mechanisms comprises a number of systems aimed at sharing data on fisheries activities. Indeed, EFCA not only provides for formalised coordination of the Member States' enforcement activities, but it also supplies them with shared databases and systems in order to view, collect, share and use data on fisheries activities and thus help carrying out inspections and sanctioning operations in support of the JDP activities. The main system in this respect is the Fisheries Information System,[43] an integrated system composed of the EFCA electronic reporting system (ERS), the EFCA electronic inspection report (EIR) system,[44] the Vessel Monitoring System (VMS) and Fishnet, which is a web-based system providing for a virtual office-like environment designed to support the transfer of information by various means, such as voice, video conferencing, email and instant messaging. It also includes tools for collaborative document writing, a calendar and a mission planner. Of specific interest is the VMS, a satellite-based monitoring system, which, at regular intervals, provides data to the fisheries authorities as regards the location, course and speed of vessels. The VMS is set up pursuant to Council Regulation (EC) No 1224/2009. Specifically, Article 9 provides that all coastal EU countries should set up mutually compatible systems, in order to allow countries to share data and the Commission to monitor compliance with the rules. These data, collected through the VMS and managed by the Commission, allow the monitoring of the behaviour of fishing vessels in real-time, in particular for control purposes. The data are mainly managed by the Member States' Fisheries Monitoring Centres, but in

[42] See <www.efca.europa.eu/en/content/mediterranean>. See specifically Art 10 of 2014/156/EU: Commission Implementing Decision of 19 March 2014 establishing a specific control and inspection programme for fisheries exploiting stocks of bluefin tuna in the Eastern Atlantic and the Mediterranean, swordfish in the Mediterranean and for fisheries exploiting stocks of sardine and anchovy in the Northern Adriatic Sea OJ L 85/15.

[43] See <www.efca.europa.eu/en/content/efca-fisheries-information-system>.

[44] Equipment Identity Register (EIR) helps operators to protect their networks and revenues against the use of stolen and unauthorised devices.

specific cases they are provided to the Commission services.[45] Finally, in addition to the systems noted above, EFCA provides Member States with the Electronic Inspection Report (EIR) Systems Software as Service (SaaS), to use as their own domestic system.

All the abovementioned mechanisms and tools play a key role in the CFP's broad mission to promote and facilitate Member State surveillance activities in fisheries. It is worth noting that, as highlighted in earlier research, no mechanism of networked enforcement provides for shared sanctioning activities, which remain the competence of national authorities.[46]

This paper will further concentrate on the various networked tools and mechanisms for the exchange of data and/or best practices, which involve Member States and EFCA, and the European Commission to a lesser extent (eg in the case of the VMS, in which no direct involvement of the EFCA is envisaged). These networked activities involve, in a collaborative fashion, the exchange of data and information to increase the efficiency of the enforcement activities, and to provide Member States with advanced technologies. This form of networked enforcement is not a *unicum* in the system of EU administrative governance. As has been noted, "most forms of procedural cooperation in implementing EU policies are based on the joint production, gathering and management of information, and/or exchange of information".[47] The scholarship that has engaged with the phenomenon of information sharing has considered that the forms of administrative cooperation in information exchange may vary from an *ad hoc* case to a constant and structured flow of information between one or more administrative authorities. The most advanced form of information management can be found in shared databases, as is the case in the CFP, where the information is stored and is accessible to all relevant national and European authorities without the need to make a prior request for it.[48]

These exchanges of data and best practices may give rise to problems in terms of accountability. As accountability has proved to be a relevant issue in CFP with regard to the shared enforcement activities between the EFCA and Member States,[49] this could also be the case for networked enforcement activities. In the following sections, we account for an analysis of the relationship between political and judicial accountability, on the one hand, and the system of networked enforcement within the CFP with a specific focus on the data sharing activities, on the other hand, in order to cast some light on possible gaps therein. Accountability is herein understood as a "relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass

[45] See <www.efca.europa.eu/en/content/data-and-systems-fisheries-activities>. See also the Commission's dedicated website at <ec.europa.eu/fisheries/cfp/control/technologies/vms_en>.

[46] Cacciatore and Eliantonio, supra, note 24.

[47] HCH Hofmann et al, *Administrative Law and Policy of the European Union* (Oxford, Oxford University Press 2011) p 16.

[48] J-P Schneider, "Basic Structures of Information Management in the European Administrative Union" (2014) 20 European Public Law 89. See also DU Galetta et al, "Information Exchange in the European Administrative Union: An Introduction" (2014) 20 European Public Law 68; F Wettner, "The General Law of Procedure of EC Mutual Administrative Assistance" in O Jansen and B Schöndorf-Haubold (eds), *The European Composite Administration* (Antwerp, Intersentia 2011) p 314.

[49] Cacciatore and Eliantonio, supra, note 24.

judgement, and the actor may face consequences".[50] In this respect, indeed, every interested party might want to find information on how the agent carries out their enforcement tasks on behalf of the principal, or might want to ask for the judicial control of such tasks.

## IV. Political accountability

### 1. The European level

With specific regard to data exchanged between Member States, the EFCA and the Commission in the framework of a JDP, whose contents are clearly established by the Commission in the SCIPs,[51] EFCA has reporting obligations to the public, through its monitoring reports, which are released quarterly, and to the other EU institutions (Parliament, Council, Commission and Court of Auditors), together with the Member States, to which it has to forward the annual general report on the Agency's overall activity.

For example, in the latest report on the Mediterranean JDP,[52] the Agency provides information regarding the total number of inspections and of (alleged and ascertained) infringements thereof, distinguished according to the type of violation, and whether they relate to sea or land operations.

Such accountability mechanisms, however, do not apply to the remaining data contained in the various databases mentioned above, which are not subject to those specific reporting obligations pursuant to the JDPs. Hence, if data are shared but do not necessarily result in a sanction, no accountability at the European level is foreseen.

EFCA also undergoes financial accountability, insofar as its Executive Director must draw up each year a draft statement of estimates of EFCA's revenues and expenditures to have its budget granted by the Commission, based on which the Administrative Board will further issue a draft statement of estimates, to be forwarded to Commission, which will in turn forward it to the Parliament and the Council (representing the EU budgetary authority) in charge of issuing the final budget authorisation. Included in the reported activities are the overall costs of data monitoring and networks on its annual budget (database enhancement and development, IT consultancy services and studies, meetings, mission expenses and associated costs related to the development of data monitoring systems and networks).[53]

It can therefore be concluded that, at EU level, data sharing activities carried out in the enforcement of the CFP are subject to a limited accountability, namely only in as far as these data are incorporated in monitoring reports prepared periodically by EFCA. A stronger form of accountability is of a financial nature, which concretises itself in the

[50] M Bovens, "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 European Law Journal 450.

[51] For the "Mediterranean" JDP, the SCIP was issued by Commission Implementing Decision 2014/156/EU of 14 March 2014, OJ L 85/15. The data to be exchanged are listed in Art 12.

[52] Available at <www.efca.europa.eu/sites/default/files/atoms/files/Q3-MED%20web%20report.pdf>.

[53] EFCA, *AB Decision 17-III-4 of 18/10/2017 Budget and establishment plan of the European Fisheries Control Agency for year 2018* (Vigo, EFCA 2018) p 7.

need for EFCA to account, amongst other things, for the expenses incurred in operating the data sharing applications.

## 2. The domestic level

Both in Italy and in France, with some slight differences, the NCAs do not seem to have any specific reporting or information obligation towards the Parliament or any other national institution with regard to what data they share through the Fisheries Information System and JDP operations with other concerned national and EU authorities. In particular, this is specifically so in Italy, where the relevant legislation (Legislative Decree 4/2012[54]) does not establish any specific obligation for the authorities concerned[55] to report or inform other authorities with regard to the decisions taken in carrying out their roles of data sharing management. Almost the same applies to French authorities, since the relevant legislation (a Ministerial Decision of 30 December 2017)[56] does not define any specific duty of reporting for any of the authorities concerned.[57] However, specifically in France, the National Council of the Sea and Littoral (CNML) – a legal structure comprising members of Parliament, local authorities as well as societal stakeholders – has a duty to report its activity to the regional councils each year so as to ensure the coherence of local maritime policies with the national policy for the sea and coastlines, though this does not specifically address responsibilities regarding data sharing activities.

Conversely, in both cases, the national competent authorities seem more accountable in the financial field, according to the European Maritime and Fisheries Fund (EMFF) and to the requirements therein, to be set out at the national level. The Fund is used to co-finance projects, along with national funding.[58] Each Member State is indeed allocated a share of the total budget, based on the size of its fishing industry, and has to draw up an operational programme, which has to be approved by the Commission.

[54] Decreto Legislativo 9 gennaio 2012 no 4, Misure per il riassetto della normativa in materia di pesca e acquacoltura, a norma dell'articolo 28 della legge 4 giugno 2010, n. 96, Official Journal of the Italian Republic, 1 December 2012, no 26.

[55] In Italy, the competent authority in charge of the application of Regulation no 1224/2009 is, pursuant to Legislative Decree no 4/2012, the Ministry of agriculture, food and forestry, with its Directorate General for Fisheries and Aquaculture. Control and inspection activities are carried out by the national Harbour masters, through the territorial partition into maritime districts, under the authority of the Ministry. Other central and local maritime authorities then support the General commander, which coordinates the activities: the Coast Guard, the Navy and the *Carabinieri*, all headed by the Ministry of Defence; the national police, belonging to the Ministry of Interior; the finance police, headed by the Ministry of Finance; and, finally, the Ministry of Health, as regards veterinary issues.

[56] Arrêté du 30 décembre 2017 portant organisation et attributions de la direction des pêches maritimes et de l'aquaculture, Official Journal of the French Republic, 31 December 2017, no 305.

[57] In France, the competent authority in charge of fisheries management is the Ministry of Agriculture and Food, with its Directorate of Maritime Fisheries and Aquaculture. Control and inspection activities are carried out, on the basis of national and regional plans, by a number of local authorities, depending on their respective area of competence and on the nature of the controls themselves. The list of the competent authorities, both for administrative and judicial controls, is given in the Rural and Maritime Fisheries Code. In practice, most of the controls are conducted by the maritime affairs administration, the Navy, and the national and maritime *gendarmerie*. See further the consolidated version of the Rural and Maritime Fisheries Code available at <www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071367>.

[58] The Fund was established by Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund [2014], OJ L 149/1. See <ec.europa.eu/fisheries/cfp/emff_en>.

With reference to both operational programmes 2014–2020,[59] the correct implementation of the CFP (Priority 3) is among the EU-level priorities. To this end, to be eligible for funding, projects have to be able to implement a complete and usable database, integrating data from fisheries with those from fish stocks exploited from commercial purposes. The Fund is to support a precise definition of parameters and methodologies to comply with the information needs. It also aims at supporting operational costs linked to supply concerned authorities with men and equipment. Among the specific targets set out for the Priority 3 is the "improvement of the collection and management of data", which is in turn translated into specific performance indicators.[60] It follows that the capacity of both Italian and French competent authorities to handle data sharing activities is subject to an *ex post* control by the upper authority in charge of supervising over the EMFF correct allocation, respectively the Directorate General for Fisheries and Aquaculture in Italy and the Directorate of Maritime Fisheries and Aquaculture in France, which are in charge of deciding the share of funding for each action taken within the fisheries.

It follows from the above explanation that no specific political accountability mechanisms at the information and discussion stage are envisaged in either of the countries analysed, although in both there is a form of financial accountability (*ex ante* and *ex post*) regarding how the authorities concerned decide to allocate funds for data sharing activities within the CFP.

## V. Judicial accountability

### 1. Introduction: the duality of jurisdiction

As far as the judicial control of data sharing activities is concerned, the first step is that of the identification of the competent national courts. To this end, in an information sharing context, one could isolate the act of providing information or placing it in a database, and the act of accessing and retrieval of the information from the database and, where relevant, the act of forwarding the information present in a database by an authority to another authority. It is likely that these sets of actions, at both national and EU level, will not be considered to be reviewable.

The starting point of this discussion is, as observed in earlier research, a dissociation between the authority gathering information and the authority taking a final decision on the basis of that information.[61] In such situations, because of the strict duality of jurisdiction which informs the system of judicial protection in the European

[59] For Italy: *Programma operativo del FEAMP*, available at <ec.europa.eu/fisheries/sites/fisheries/files/docs/body/op-italy_it.pdf>. For France: *Programme Operationnel Période 2014-2020*, available at <ec.europa.eu/fisheries/sites/fisheries/files/docs/body/op-france_fr.pdf>.

[60] Respectively: Italian OP, 62; French OP, 107.

[61] H Hofmann, and M Tidghi, "Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks" (2014) 20 European Public Law 154. See also M Eliantonio, "Judicial Review in an Integrated Administration: the Case of 'Composite Procedures'" (2014) 7 Review of European Administrative Law 65 and specifically on data sharing activities, M Eliantonio, "Information Exchange in European Administrative Law: A Threat to Effective Judicial Protection?" (2016) 23 Maastricht Journal of European and Comparative Law 531.

integrated administrative space, the judicial level responsible for a claim corresponds to the administrative level that has carried out the act or action which is being challenged.

For the process of sharing of information which is of relevance to this article, the duality of jurisdiction implies that the placing of information in one of the databases would have to be reviewed by the courts of the system to which the national authority placing the information belongs, while the retrieval of the information by another authority (which will possibly issue sanctions on the basis of this information) will be a competence of the corresponding domestic courts. If there is an act of forwarding of data by EFCA, as seems to be the case in the VMS, this act would have to be reviewed at EU level. If there is an act of submitting or forwarding data to or from a shared database by the national authorities, this act would have to be reviewed at national level.

## 2. The European level

Pursuant to Article 263 TFEU, the EU courts may review the legality of acts "other than recommendations and opinions". Under the case law developed before the Lisbon Treaty (and concerning the predecessor of Article 263 TFEU, ie Article 230 EC), the scope of reviewability of EU measures was extended to "all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects".[62] Specifically concerning acts of agencies, Article 263 TFEU provides that these can be reviewed if they are "intended to produce legal effects vis-à-vis third parties".

On this basis, the act of forwarding a piece of information contained in a database by EFCA will be considered merely as a preparatory procedural step, unable to produce legal effects on an individual's legal sphere. An exchange of information from the EU to the national authorities has indeed been held not to be reviewable by European courts because it was not considered capable of producing effects on the applicant's legal sphere.[63]

This conclusion, however, does not mean that EFCA's actions will, under no circumstances, come under the EU courts' scrutiny. In the system of remedies created by Treaties, EU measures can, in principle, be challenged not only directly through an action for annulment provided under Article 263 TFEU but also indirectly, ie through a preliminary question of validity pursuant to Article 267 TFEU, by bringing an action against a national measure and in the national proceedings challenging the validity of the underlying EU measure. According to the case law of the CJEU, the range of measures which can be challenged indirectly through a question of validity is wider than those which are amenable to judicial review in direct actions since it is held to include "all acts of the institutions without exception".[64] This implies, for the

[62] Case 22/70 *Commission v Council (ERTA)* ECLI:EU:C:1971:32, para 42.

[63] Case C-521/04 P(R) *Tillack v Commission* ECLI:EU:C:2005:240. See, however, Joined Cases F-5/05 and F-7/05 *Violetti and Others v Commission*, ECLI:EU:F:2009:39, where a claim against the forwarding of information from OLAF to the Italian authorities was considered as a reviewable act by the Civil Service Tribunal. The ruling was, however, overturned on appeal by the General Court on the basis of the *IBM* case law. Case T-261/09 P [GC] *Commission v Violetti and Others*, ECLI:EU:T:2010:215.

[64] Case C-322/88 *Grimaldi v Fonds des maladies professionnelles* ECLI:EU:C:1989:646, para 8; Case T-193/04 *Tillack v Commission* ECLI:EU:T:2006:292, para 80.

purposes of this analysis, that the data sharing activity of EFCA could be challenged indirectly through a preliminary question of validity in national proceedings against a sanction imposed on an infringer by the NCAs or another enforcement act carried out by a NCA.[65] This conclusion is supported by the *Tillack* case, in which the applicant tried to challenge the transfer of information from OLAF to the competent national authorities at the European level. While the Court of First Instance found that the transfer itself could not be considered a reviewable act, in response to the suggestion that this conclusion may deprive the applicant of effective judicial protection, it did state that the applicant had the opportunity to bring an action before the national court and ask it to request a preliminary reference ruling from the CJEU.[66]

## 3. The domestic level

According to the traditional approach of the French and Italian legal systems, an act can be challenged in an action for annulment (*recours pour excès de pouvoirs* in France and *azione di annullamento* in Italy) if it has a "decisional" character, meaning that it is capable of modifying the legal sphere of the applicant.[67] For this reason, purely internal acts and preparatory ones have been generally considered incapable of being autonomously challenged before the courts.[68] This principle finds an exception only if the preparatory measure is such as to be able to "shape" the decision-making process in a definitive way.[69] Hence, on this basis, a French or Italian court is likely to consider inadmissible an action for annulment brought against an act of sharing of data, given that this act is not itself capable of changing the legal sphere of the applicant, and that subsequent sanctions are only possible but not certain.

As a consequence, the only option left to the applicant is that of challenging the final (sanctioning) measure on the basis of an alleged irregularity of the data which formed the basis for the sanction. However, this claim will only lead to the annulment of the measure if the court with jurisdiction to review its legality agrees to review the alleged unlawfulness of the data sharing activity. For a national court this implies going beyond the traditional limits of horizontal separation of jurisdictions and essentially reviewing the legality of a foreign administrative measure. The matter has been recently considered by Advocate General Bobek in a case which concerned marketing authorisations in the field of pharmaceuticals. The Advocate General indeed considered that "the territorial nature of each of the marketing authorisations and the

[65] Although this does not seem to have ever occurred, according to a search for the keyword "EFCA" in the Curia database.

[66] Case T-193/04 *Tillack v Commission*, para 80.

[67] G Pellissier, *Recours pour excès de pouvoir: conditions de recevabilité* (Encyclopedie Dalloz, Repertoire du contentieux administratif 2010); V Cerulli Irelli, *Lineamenti del diritto amministrativo* (Milan, Giuffrè 2009) p 385.

[68] For France, see eg Conseil d'Etat, 19 January 2011, no 332635, *Mazroui*; Conseil d'Etat, 15 Janaury 1997, no 177989 and 180694, *Assoc. Radio Sud-Vendée-Pictons*; for Italy, see eg Consiglio di Stato, sez. V, 20 August 2015, no 3955; TAR Lecce, Puglia, sez. II, 18 February 2016, no 346.

[69] For France, see eg Conseil d'Etat 29 July 1994, no 140976, *Assoc. pour la promotion et la défense du cadre de vie à Bartenheim*; for Italy, see eg Consiglio di Stato, sez. IV, 28 March 2012, no 1829.

necessary correlating territorial nature of judicial review" is likely to create obstacles to the control of acts or actions originating in another jurisdiction.[70]

Whether and to what extent national courts would be willing to review the legality of a preparatory act originating from a different legal system is still an unexplored matter and one which is difficult to assess in a methodologically sound way. However, this seems to have happened at least once, when the French Council of State agreed to review a foreign alert issued in the context of the Schengen Information System.[71] However, this may well have remained an isolated case and it is certainly not a precedent that can provide sufficient legal certainty as to the reviewability of information provision measures. Furthermore, even such an innovative approach would only cover the review of alleged irregularities of information sharing activities stemming from the underlying EU legislation, and not other irregularities stemming from the violation of, for example, the national procedural law of the Member State issuing the alert, as these are aspects which the courts looking at the final measure that is being challenged would certainly not be willing to review.

## VI. Conclusions

The analysis carried out above has revealed that networked enforcement is prevalent in the CFP, yet the mechanisms of both political and judicial accountability have not been able to keep up with this novel institutional arrangement.

With regard to the selected mechanism of networked enforcement, that of data sharing, it has been shown that political accountability of the competent national and EU authorities is almost missing. Indeed, apart from limited reporting obligations on the side of EFCA, no political accountability is in place at the national level. This lack of political accountability seems to be at least partly compensated by forms of financial accountability.

In both national cases the picture is similar, and financial accountability is somewhat pushed from above: although it is transposed in the national system of relationships, and the decisions regarding how it is deployed are taken at a national level, the EMFF is a European fund and the system of national planning and reporting has been decided by the EU. Therefore, financial accountability at the national level seems to be promoted from the EU level.

With regard to judicial accountability, the picture is shaped by the strict duality and separation between the EU and the various national jurisdictions. This implies that data-sharing activities, which per definition constitute preparatory steps in the decision-making process, cannot be autonomously reviewed either at national or European level. With regard to the EU level, this shortcoming is partly compensated by the possibility to indirectly challenge the validity of a data-sharing activity through the preliminary question of validity. In the absence of a "reverse" or "horizontal" preliminary reference procedure,[72] the gap of judicial protection is not filled if the

[70] Opinion of AG Bobek in Case C-557/16 *Astellas Pharma GmbH* ECLI:EU:C:2017:957, para 92.

[71] Conseil d'Etat, 9 June 1999, no 190384, *Forabosco*. See also Conseil d'Etat, 23 May 2003, no 237934, *Catrina*.

[72] See further the reflections contained in Eliantonio (2014), supra, note 61, and Eliantonio (2016), supra, note 61.

preparatory data-sharing action originates from a national authority. In such cases, it remains an open question whether and to what extent national courts have been and will be willing to review the legality of an act originating from a different legal system.

These conclusions largely align with earlier research concerning shared enforcement in the field of the CFP.[73] As with shared enforcement, networked enforcement also displays similar gaps in both political and judicial accountability. The ensuing question is how this scenario can be challenged in the future and how different mechanisms of accountability can be designed to control these forms of networked enforcement. One pointer emerging from this analysis is the role which the EU may play in promoting fair institutional arrangements at the national level, as happens in the financial field.

Furthermore, more future research is needed, mostly comparative, both horizontal (to examine accountability mechanisms at the national level beyond the case studied analysed in this paper) and vertical (to examine what happens in other mechanisms of networked enforcement of the CFP, such as in the case of joint inspections, as well as in other policy fields, and what lessons can be drawn from them in terms of networked enforcement) in order to understand whether the evolution of enforcement governance towards mixed systems will go hand in hand with the evolution of accountability mechanisms or whether, as seems to be the case, the former has a faster pace than the latter and a more general re-thinking of the very concept of accountability is needed.

[73] Cacciatore and Eliantonio, supra, note 24.